Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

BERNADETTE FULLER, and all others similarly situated,

Petitioners,

v.

INSTINET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred when it created a Notice due process violation when its decision to not provide notice to a class in which certification was denied, was in direct conflict with the Seventh Circuit's opinion which stated that notice to a class must be provided, pursuant to Rule 23(e) and is mandatory in both certified and non-certified class actions alike.

2. Whether the Second Circuit erred when it failed to understand that overwhelming statistics that demonstrate that in a racial discrimination action, blacks and Hispanics who receive significantly less pay for the same job, fulfill Rule 23(a)(2)'s requirements.

3. Whether the Second Circuit erred when it refused to apply 42 U.S.C. § 1981(c)'s "impairment" clause to a woman who reported the statute's violation and who was retaliated against and given an evaluation which stopped her from advancing within her company or from receiving a positive recommendation to a new company.

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OPINIONS BELOW

The opinion of the court of appeals is by summary order and not published and is reproduced in the appendix hereto. (Appendix A) (hereinafter "App.A). The decisions of the District Court, denying class certification and summary judgment denying notice to the denied class and for retaliation, are likewise unreported and are reprinted in the appendix. (App. B. and C. respectively).

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on December 29th 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

U.S. STATUTORY PROVISIONS INVOLVED

Rule 23. Class Actions

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

42 U.S.C. § 1981. Equal rights under the law

> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Amd. XIV Section 1, Const.

> [N]or shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Petition presents an important issue of first impression to this Court, over which the federal courts of appeal are divided: does the court after denying class certification have the duty to notify the denied class of persons. The rationale being that the filing of a class action suit tolls the statute of limitations for all the members of the class, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-54, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974); *Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 627 (7th Cir. 1986). After the suit is dismissed without prejudice or when class certification is denied the statute resumes running for the class members. *Crown, Cork & Seal Co. v. Parker, supra*, 462 U.S. at 354; *Chardon v. Fumero Soto*, 462 U.S. 650, 658-60, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983); *Elmore v. Henderson, supra*, 227 F.3d at 1012; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *Glidden v. Chromalloy American Corp., supra*, 808 F.2d at 627; *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355-56 (Fed. Cir. 2000); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1384-85 (11th Cir. 1998) (en banc); *Rodriguez v. Banco Central*, 790 F.2d 172, 179 (1st Cir. 1986). Unless they are notified that the suit is dismissed, they may fail to file their own suits and thus fail to "re-arrest" the statute of limitations,

Glidden v. Chromalloy American Corp., supra, 808 F.2d at 627; *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1409 (9th Cir. 1989), and as a result they may find themselves time barred without knowing it.

TELLTALE SIGNS OF DISCRIMINATION

Petitioner, Bernadette Fuller, who is black, filed this class action, pursuant to Fed. R. Civ. P. 23(b)(2), on behalf of herself and others after she learned (facts are uncontroverted) that at Instinet, Inc. that there were 62 white vice-presidents, but no black vice-presidents and only one Hispanic vice-president.[1] The 62 White vice-presidents received on an average $148,661. The one Hispanic Vice-President was paid less than one-halve of the white vice-presidents: $70,000. Instinet had no black vice-president.

Ms. Fuller learned that of the 80 highest paid employees at Instinet there was only one black and no Hispanic. Ms. Fuller learned of the 273 employees earning more than $100,000 there were only 6 blacks and 4 Hispanics. Ms. Fuller further learned, that of the 145 managers, that black managers made 13% less than white managers and Hispanic managers made 21% less than white managers. Moreover, while the first 34 non-minority managers made between 200,000 and 100,000, the highest paid minority Instinet manager (35th overall) was Hispanic and made only 100,000.

As a result of Ms. Fuller bringing to the attention of the Equal Employment Office (EEO) the pervasive discrimination at Instinet, and her lawsuit, she was blackballed by her superiors who gave her an immediate

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1. Petitioners at the certification court submitted several Affidavits from their Expert, Richard Faust, and a book of diagrams and charts demonstrating the overwhelming discrimination statistics stated here.

negative evaluation. Instinet had in the past only performed reviews at the end of they year but as a direct result of Ms. Fuller's complaint, Instinet altered its review procedure and gave Ms. Fuller an immediate midyear review. The review was 180% opposite to Ms. Fuller's past reviews[2] and was so damaging to her career that it would have been impossible for her to advance at Instinet or be given an excellent recommendation to a new job at a new company. Ms. Fuller as a result of Instinet's retaliation brought a claim pursuant to Title VII and 42 U.S.C.S. § 1981.

The Second Circuit Court of Appeals *reversed*[3] one of the lower court rulings and the lower court's misunderstanding of Title VII and 42 U.S.C.A. § 1981.[4] The lower court had held that, Ms. Fuller, a black, in a discrimination action could not represent Hispanic persons.[5]

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2. Reviews listed side-by-side below at page 25.

3. It should be noted that the Court of Appeals statement that their decision Affirmed the lower court is inaccurate. (App. A at 2a). The lower court clearly stated that a black could not represent a Hispanic. Petitioners argued for 8 pages in their Brief and for 3 pages in their Reply that a black could represent a Hispanic. Respondents had a caption praising the lower court for not permitting blacks to represent Hispanics over 2 pages. The appellate court thus only partially affirmed an outcome where the lower court refused to consider Hispanic statistics of discrimination because it believed that Hispanics were not represented.

4. It should be noted that Petitioners at the Court of Appeals had to exhaust and squander effort and energy much of her appeal overcoming this issue which the Court of Appeals reversed.

5. The lower court held,

> Plaintiff Cannot Represent Hispanics And Other Minorities

(Cont'd)

In reversing the lower court the Court of Appeals held, "that Supreme Court precedent indicates that a black lead plaintiff can represent a class containing Hispanic employees when a general discrimination manifests itself in the same was against both black and Hispanic employees. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Rossini et al. v. Ogilvy & Mather*, 798 F.2d 590, 598 (1986)." (App. A, at 3a).

REASONS FOR GRANTING THE PETITION[6]

Currently there is little, or better stated, little to no guidance for Rule 23(e)'s effect on a class that has been refused certification. Lower courts protect the "hidden and absent" class members with everything Rule 23 brings to

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(Cont'd)

> Plaintiff, a black woman formerly employed at Instinet, seeks to represent a class consisting of "blacks, Hispanics and other minorities." *Compl.* ¶ 16. It is well-settled, however, that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 102 S. Ct. at 2370 (internal quotations omitted) . Because Ms. Fuller is black and not Hispanic or otherwise a minority, she lacks standing to bring any of the claims presently asserted in a representative capacity on behalf of Hispanic or other non-black minority employees. *See*; *see also Gavenda v. Orleans County*, 1997 WL, 251543, (W.D.N.Y. 1997)

Order denying certification, (App. C., at 22a-23a). Dated 11.26.01.

6. Petitioners bring to the Court's attention that there was a delay of more than two years in the action that was due to the lower court's very busy schedule. Final Certification papers were submitted 12/28/2000. Denial of Class Certification (eleven months later on) 11/28/2001. Summary Judgment papers submitted 11/15/2002 and Final Judgment (fourteen months later on) 1/29/2004.

bear, but once an action fails to gain certification it is though Rule 23 spirals to a bottomless pit without any protection (due process and otherwise) for citizens. Given the extant circumstance and effect in every case where Rule 23 is applied and the class denied, this ultimate Court should offer its welcomed guidance. This Court can and should issue a writ of certiorari to review the opinion of the Seventh Circuit and provide guidance that is greatly needed in this important area of law.

The Seventh Circuit in *Culver v. City of Milwaukee*, 277 F.3d 908 (2002) maintains that the prejudice and injury to absent members of a class action is absolute when they are not notified of dismissal. At length the Seventh Circuit cites tolling statutes (in instances where certification has been denied), which it states, are of no value without notice.

The final consequence in a case such as the one before this Court, as there was in *Culver*, is that United States citizens have their rights protected, prior to certification or denial in a class action proceeding pursuant to Rule 23. The due process problem, under the Fifth Amendment, that arises when an action is denied, is that the citizens have a statutory clock (a property right to bring an action) which runs for the following 90 days and at the end of the 90 days their privilege to bring the action is gone. The citizens are never made aware that a property right which may have value is about to expire without immediate action on their part.

The Second Circuit, on the other hand, has expressly refused to apply the law or logic in *Culver*. With the utmost respect for the Second Circuit, there is no logic in the manner in which the Second Circuit has applied Rule 23(e). There is no legal reasoning in any Second Circuit action that sorts out why the courts apply Rule 23 to include "lack of notice." With regard to Rule 23(e), the Second Circuit follows what

it follows because it follows it. There is virtually no Rule 23(e) Second Circuit law based upon legal reasoning.

The Seventh Circuit, however, in Culver, has made an attempt to tackle (for lack of a better word) a Rule 23 problem that has been left dangling by the lower courts.

Review by this Court also is necessary to address two additional important issues posed by the Second Circuit's decision. First, whether the Second Circuit erred when it misapplied the precedence of this Court's class action ruling in *Bazemore v. Friday*. Similarly, the Second Circuit analysis overruled or misinterpreted this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and forced Petitioners to scientific certainty before Rule 23 was applicable. Thus, the Second Circuit required Petitioners to have prevailed on the merits of the action rather than "whether the requirements of Rule 23 [were] met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

Second, despite the plain language of 42 U.S.C. § 1981(c), the "impairment" clause, the Second Circuit misread and misapplied 42 U.S.C. § 1981(c). The Court in error held that a person in effect who was impaired by retaliation had to not only demonstrate that her employment position[7] was shattered because she reported the companies violation of federal law to the EEO office — but in addition — had to prove that she could neatly fit into the poorly

7. "Employment position" to mean, in straightforward language, if that person, by a companies evaluation, had value or merit that would permit her to rise with other employees within the company or if she would seek new employment would she receive a favorable recommendation. After reporting federal violations the answer in this action is that Petitioner would have no future with this company or any other company.

conceived and designed parameters of what the Second Circuit viewed as retaliation. The practical effect, which is uncontroverted, is that under Second Circuit law a person can be legally retaliated against for reporting federal violations but be simultaneously left unprotected by the *statue* which was *designed specifically* to protect persons who report federal crimes. Moreover, the Second Circuit's view of the retaliation statute's effect on an employee who reports a federal crime, cannot be reconciled with either the literal meaning or intended effect of federal statute 42 U.S.C. § 1981(c).

I. A review of Rule 23 (e) is warranted to resolve a conflict between the Second Circuit and the Seventh Circuit as to whether notice is required in an action that fails to obtain certification

a. Rule 23(e) imposes a duty on the district judge that is nondelegable, he being himself a fiduciary of the class" and as the Seventh Circuit stated, in that "[t]he prejudice to class members from a dismissal of which they may be unaware is the same in either (certified or uncertified) case." *Culver* at 914. (parenthesis added.)

In sharp disagreement and conflict with the Seventh Circuit, the Second Circuit affirming the lower court held, "[w]e decline to adopt the rule or reasoning in *Culver* in light of the plain language of former Rule 23(e)." (App.A, at 4a). Thus, the Second Circuit affirmed the lower court's distinction between a certified and a non-certified class action.[8] Clearly the Court was

8. "Plaintiff cites no authority for the proposition that putative class members must be notified of a denial of class certification. Unlike the class members in *Culver*, no prospective class members received any notification of class certification, which would induce them to rely upon this action to protect their interests." (App. B, at 11a).

immensely and profoundly influenced by the fact that it believed the foundation of notification of the class was singularly dependent on whether or not certification occurred.[9] Finally, the Seventh Circuit read the same "plain language of former Rule 23(e)," and came to a conclusion that was 180% opposite to the Second Circuit.

The question too arises: why under Rule 23 should there be a distinction between a class of persons who have been first certified and then decertified – and – a class of persons who are never certified. Under both scenarios the courts have declared – that at that point in time they do not have law or evidence on their side to continue their action – based upon their lead plaintiff. Under due process, the core of which is Notice, to have due process there must be Notice of a Right which will be lost without action taken.

The Seventh Circuit held that whether a class action was certified or dismissed was of no importance or consequence when matched against the prejudice against class members if they failed to receive notice of lack of certification.

The Seventh Circuit emphatically stated that it was a lower court's responsibility to make certain that the class action's attorney notified the class. Justice Posner implied in the strongest language, that notification of all class members in a certified or denied certification class by the district court judge was nondelegable.

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9. In the present action the lower court denied lead plaintiff access to the names and addresses of persons in the class.

b. Rule 23(e) and this Court's Fiduciary Duties to Absent Class Members Mandates that Notice Be Given of The Dismissal of this Action [10]

The Court must represent absent class members in a class that is not certified. In *Culver*, the action had been decertified. In the action *Culver v. City of Milwaukee*, 277 F.3d 908 (2002) the Seventh Circuit held,

> The district judge failed to notify the class members of the decertification of the class. He thought they probably were unaware of the suit and therefore would not be prejudiced by its demise. "Probably" is not good enough; it implies that some class members may well have been prejudiced. Although it is not yet definitively settled whether Rule 23(e) is applicable when a class action suit is dismissed before the class is certified (the rule does not indicate which sense of "class" it intends, the certified or the certified plus the "putative," that is, the class alleged in the complaint before any class is certified), see, e.g., *Rice v. Ford Motor Co.*, 88 F.3d 914, 919-20 n.8 (11th Cir. 1996), we think it the better view, as well as the one suggested in *Glidden v. Chromalloy American Corp.*, *supra*, 808 F.2d at 625-27, that it is indeed applicable to such suits. The prejudice to class members from a dismissal of which they may be unaware is the same in either case. Stated otherwise, the context in which "class" is used in Rule 23(e) indicates that it is

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10. Please note that some Courts considering Rule 23(e) have "conclude[d] that notice may be required by the due process clause of the Fifth Amendment even if not be Rule 23(e)." *Glidden v. Chromalloy American*, 808 F.2d 621 (1986).

> not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed. E.g., *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975).
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> * * *
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> *Rule 23(e)* is for the protection of the class members, not of the class representative or his lawyer—who will usually have no interest in notifying the class members of the failure of the class action—let alone for the protection of the defendant, who will be content to let sleeping dogs lie. Rule 23(e) should therefore be understood as imposing a duty on the district judge that is nondelegable, he being himself a fiduciary of the class. See *Stewart v. General Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985); Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995); Greenfield v. Villager Industries, Inc., supra, 483 F.2d at 832.* The judge's duty is to order notice unless the risk of prejudice to absent class members is nil and to review for adequacy the form of notice proposed by class counsel in response to the order.

Id. at 914-15.

The essence of *Culver* is that the prejudice and injury to absent members of a class action is absolute when they are not notified of dismissal. The Court states that tolling statutes (in instances where certification has been denied), are of no value without notice.

The Seventh Circuit, in *Culver* continues to annunciate the harm and prejudice on lack of notice,

> Stated otherwise, the context in which "class" is used in Rule 23(e) indicates that it is not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed. E.g., *Pearson v. Ecological Science Corp., 522 F.2d 171, 177 (5th Cir. 1975)*

Culver at 914-15.

The Seventh Circuit relied heavily on *American Pipe* and *Crown, Cork & Seal* and *Glidden*. In *Glidden*, another Seventh Circuit action the Court stated,

> The filing of a suit with a class allegation tolls the running of the statute of limitations with respect to the absent class members. *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974); Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), cert. denied, 445 U.S. 942, 100 S. Ct. 1336, 63 L. Ed. 2d 775 (1980).* The Supreme Court reasoned that absent members may learn of and rely on a suit even though the class has not been certified. But the time begins to run again if the district court refuses to certify the case as a class action. *American Pipe, 414 U.S. at 561; Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983).* Cf. *Chardon v. Fumero Soto, 462 U.S. 650, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983).* The voluntary dismissal of the class component of a suit also must restart

> the time. Yet if the absent class members do not receive notice under Rule 23(e) that their champion has abdicated, they will not learn that it is necessary to file suit to protect their own interests. By the time they learn that the representative has given up on the class action, it may be too late; so even if the representative should win his own case, the other members of the class may be left out in the cold. This is a risk whenever and however the plaintiff deletes a class allegation. We therefore conclude that Rule 23(e) applies to this case and that Glidden's election to appeal without waiting for the decision on the motion to certify a class did not convert this case into an individual action. He needed the court's approval.

Glidden at 627.

Notice of class dismissal, under *Culver* is mandatory, and under *Culver* the Court may not guess that "probably" (*id.* at 914) those who were discriminated against did not know of the action and cannot be therefore be prejudiced. Whether a person is aware or not that they are discriminated against does not reduce the unlawfulness or the insidiousness of the discrimination action against them.

The Second Circuit, in effect has stated, that what a "person does not know cannot hurt them." It is wrong logically, it is wrong lawfully and it is in basic conflict with the United States Constitution of America. Finally, it is for the Courts to enforce all laws which are for the common good and it does not depend on whether or not the person was aware that he was statutorily and unlawfully

discriminated against.[11] If a crime is committed against a person, it is still a crime whether or not the person was aware that a crime against his person was taking place.

Moreover, it would be illogical, and an ill-fated assumption at best, that workers at Instinet Corporation were not aware that a discrimination class action was taking place and relied to their detriment upon the action.[12]

c. The Lower Court's Interpretation of Judge Posner's Seventh Circuit decision is directly opposite to Judge Posner's decision in *Culver* whereby he states that Notice must be given similarly in denied certification actions and actions which have been certified and later denied.

The lower court stated that "no prospective members received any notification of class certification, which would induce them to rely upon this action to protect their interests." (App. B, at 11a). It can be stated without any reservation or uncertainty that the lower court believed that a certified action had to exist or be certified before Rule 23(e) could be applied.

It is realistic to believe that Rule 23(e)'s notice requirement to denied classes may not be applicable to all cases and there may have to be practical exceptions that the

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11. "[N]or shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws." Amd. XIV Section 1, Const.

12. It was well documented that at all levels at Instinet directly on the same level with Ms. Fuller and above to the CEO that all were aware that a racial discrimination action was ongoing. Similarly, Instinet personally interviewed minorities and friends of Ms. Fuller to gain their thoughts on the racial discrimination action brought by her.

trial judge may declare, but because there may be exceptions should not imply that Circuit Courts should not apply the Seventh Circuit analysis where its application would be consistent with due process. The conflict between the circuits on this issue is one of paramount importance, and it merits resolution by this Court.

II. The Second Circuit discriminatory analysis of Rule 23(e) conflicts with decisions of this Court and forces class actions prove their actions prior to certification with "scientific certainty" or be dismissed.

a. The Second Circuit, parsing this Court's decision in *Bazemore v. Friday* misunderstood this Court's reasoning and permitted the exception to swallow the rule and this Court's decision.

The Second Circuit held, that "failure to account for relevant non-discriminatory factors can reduce the probative value of statistical analyses. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (*per curiam*). (App. A. at 3a). That is true, but viewing this Supreme Court's decision in its entirety this Court, in distinction to the Second Circuit analysis, was recommending that lower courts do not reject actions because they fail to contain all the elements which that court may deem necessary. In fact this Court was at odds with courts that require all factors for certification.

In *Bazemore v. Friday*, the Court held,

> The Court of Appeals erred in stating that petitioners' regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a

> regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." *Ibid.* Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.
>
> * * *
>
> Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with *scientific certainty*; rather, his or her burden is to prove discrimination by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).* Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail. (emphasis added).

Id. at 400-01.

In the present action it was the motion court's opinion, affirmed by the Second Circuit that failure to include what it perceived to be "relevant non-discriminatory factors" was fatal to the action. In doing so, the Court disregarded statistics which appeared to be overwhelming. (See pages 3-4, above,

62 white vice-presidents but no black and one Hispanic vice-president or the salary discrepancies at all levels.) The Second Circuit thus not only rejected the teachings of this Court in *Bazemore*, but the wisdom of this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) who held,

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id. at 340.

It is also, not any one factor pursued by counsel that illustrated discrimination at Instinet, but wherever one looked discrimination appeared. The converse was also true, that Respondents in this action could not demonstrate any group (vice-presidents, managers, etc.) that was free of discrimination.

b. Direct evidence provided by respondents, and reproduced in charts and graphs for the lower court, and analyzed by a statistician that for every job title blacks and Hispanics were paid significantly less for the same job title, is at a minimum a telltale sign of discrimination if not more sinister.

The Second Circuit states,

> To demonstrate such discrimination, Fuller's sole evidence was a statistical study of job *titles* and *salaries* that failed to take into account any variables other than *race*. (App.A, at 3a). (emphasis added).

That Second Circuit proclamation by itself alone was enough to certify this action. It demonstrated that a black or Hispanic person who had the same position was paid less money for the same work. *Race* is what a racial discrimination action is all about. The fact that a black or Hispanic person received less *salary* for the same *title* as a white person would receive is statistically extremely important. Discrimination took place at Instinet and the statistics and books of diagrams and charts that used *race* as a baseline and charted lower *salaries* for the same *titles* for blacks and Hispanics as their white counterparts should have been sufficient under *Bazemore* and *International Brother Hood of Teamsters*.

The Second Circuit's test defies the main beliefs and principles laid out in *International Brotherhood of Teamsters* by this Court. If a Petitioner cannot reason that a black or Hispanic person who receives significantly less pay for the same job is discriminated against – or for that matter in a sexual context, that a woman who receives significantly less pay for the same job as man would receive, is being discriminated against, it would in effect annul Title VII and

42 U.S.C. § 1981. Additional factors always add more gloss, but when the numbers were so overwhelming, the factors which are uncontroverted, being supplied by the Respondent, this action was more than sufficient to rise up to the bar of certification.

It must not be overlooked that this was a company that of 66 vice-presidents, in the heart of New York City (not in North Dakota), that it could not find even one black man or woman worthy of being vice-president — and could only find one worthy Hispanic.[13] Of the 80 highest paid employees at Instinet there was only one black and no Hispanic. That the first 34 non-minority managers made between 200,000 and 100,000, the highest paid minority Instinet manager (35th overall) was Hispanic and made only 100,000. See pages 3-4.

Petitioners respectfully submit that when the issue is one of race, when it is proven that blacks and Hispanics are paid routinely less for the same job title, Petitioners have met their burden.

c. The Second Circuit affirmed the lower court's support of statistical dueling when the Court refused to accept Petitioners' statistical variables and instead stated the variables that the Respondent and the Court believed should have been used for certification of the class.

The District Court too was fully aware that "statistical dueling" was improper in a motion for certification. (App. C, at 24a). But a Court being attentive and aware and stating on the record that "statistical dueling" is improper does not

13. This Court may take notice that President George W. Bush had little difficulty finding a black, Condoleezza Rice, for Secretary of State and a Hispanic for Attorney General, Alberto Gonzales for what might be considered fairly important governmental positions.

sanitize its opinion by merely being aware of statistical dueling's improperness. In Petitioners' Motion for Certification Petitioners provided the Court with statistics based upon information provided by Instinet.

The lower court refused to accept Richard Faust's (Petitioners' expert) analysis, and in effect disregarded past Second Circuit precedent and stated that a fuller analysis would be needed to have the class certified. The Court, in effect, held that what Petitioners have presented did not prove with *scientific certainty* that Petitioners had proven a prima facie case. Such is not required by Rule 23 and all past decisions.[14] The Second Circuit in its decision was at odds with itself which in past decisions had stated that confrontations of what are proper statistics to prove discrimination are "statistical duelings." *Caridad v. Metro-North*, 191 F.3d 283, 292 (2d Cir. Ct. App. 1999)

Rule 23, however, goes not to certainty at the certification stage but whether (Rule 23(a)(2)) there are "questions of law or fact common to the class," and if there are is there an inference that a violation of Title VII or of Section 1981 may have occurred. A requirement asking, at the certification stage, more than what Petitioners have put before the Court would fundamentally alter and revise Rule 23 because it would be not only asking for a scientific certainty, but in addition, would be going to the merits of the case.[15] If Petitioners could prove all that the Lower District required for certification they would have

14. See footnote #15.

15. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974) (quoted by *Visa Check/ Mastermoney Antitrust Litigation*, 280 F.3d 124, 2001 U.S. App. LEXIS 22480, page 14.

proved the case with scientific certainty and the liability action would have been completed.

III. The Second Circuit has refused to follow the federal statutes actual literal meaning or spirit of 42 U.S.C. § 1981(c)'s: the "impairment" clause and has replaced it with criteria which fails to follow the congressional intent.

42 U.S.C. § 1981(c) states:

> 42 U.S.C. § 1981. Equal rights under the law
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The motion court was led to error when the Court applied the Second Circuit's four-factor test to determine whether or not retaliation had taken place. Whether Ms. Fuller made a prima facie case of retaliation by (1) engaging in a protected activity (notifying Instinet and the EEOC that Discrimination was rampant at Instinet); (2) that her employer was aware of this activity; (3) that her employer took adverse action against her; (4) and whether a causal connection would exist between Ms. Fuller's protected activity and the adverse action. 42 U.S.C. § 1981(c)'s meaning, and accurate statute reading, however, demands a more literal (or actual) interpretation than the Second Circuit has applied.

Impairment means impairment. Webster defines the verb "impair" as "to diminish in quantity, value, excellence or strength." Its noun is "impairment."[16] The Second Circuit's

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16. Webster's Seventh New Collegiate Dictionary.

applied test[17] (or rule) fails to adhere or follow the federal statute and fails to be of assistance to Ms. Fuller, who was certainly impaired after she brought Instinet's discriminatory practice to the head of the EEO and later filed her complaint. She was certainly blackened when Instinet in defiance of 42 U.S.C. § 1981(c), which not only counsels against retaliation but makes it federally unlawful, when they impaired her right to object to discrimination at Instinet by giving her immediately after her discrimination objection, an evaluation that unequivocally impaired her present and future employment.

The Second Circuit's criteria, allows persons such as Ms. Fuller to fall through the cracks though she was supported by 42 U.S.C. § 1981(c)'s "impairment" clause: her right to bring an action without fear of retaliation. The Second Circuit's applied test fails badly to express situations where there was intentional "impairment" that could be covered up or hidden from the intent or spirit of the law, or in this action the statute. Instinet skirted Second Circuit law when immediately after Ms. Fuller denounced Instinet's discrimination, it did not demote her or reduce her salary. Instinet instead for all employment purposes made her a *dead* employee. Her career was finished at Instinet and it would be impossible after five years employment at Instinet to obtain a positive recommendation for a new job at a new company.

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17. Rules or criteria are helpful in case analysis. They must however give way to the literal meaning of the statute, when the Court made criteria and statute diverge. Courts aid in the statutes' completeness or understanding of the statute with their common law additions. That was certainly not the case in this action where no one can argue that Ms. Fuller remained where she was after the discrimination charge as she was prior to her discrimination charge. All that can be stated against Ms. Fuller is that she did not fit into the Second Circuit's definition of the "impairment" clause. (Respondent, Instinet, never argued that Ms. Fuller's evaluation was no worse than it was prior to her discrimination charge.)

The Second Circuit, in its affirmation of the lower court's summary judgment held that "[a]n adverse employment action is a "materially adverse change in the terms, privileges, duration and conditions of employment." *Tregalia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002)." (App. A, at 4a-5a). The holding states a truism but, as the Court may see in the present action, the holding fails to include all persons who have been retaliated against and who the statute intended to include. The statute should have included Ms. Fuller and was meant to cover the exact situation Ms. Fuller represents. Ms. Fuller did the correct reporting of a federal violation of § 1981(c) and was unquestionably punished for her role in whistle blowing.

The "impairment" portion of § 1981(c) was not taken into consideration. In that sense the Second Circuit's decision fails to fulfill the requirements of § 1981(c): the "impairment" clause. The Second Circuit "criteria" had drifted away from and took precedence over the federal statutory language.

Following Second Circuit criteria for fulfilling a federal statute's requirements is an excellent beginning. When, however, it is pointed out to the Circuit that its criteria that is used for precedent for lower court's rulings is not fully encompassing and fails to follow the statute, it is then prudent to follow the legislative statute (or provide a reason why it did not follow the statute) and adjust the criteria. In this action it is the retaliation criteria that should have been adjusted.[18]

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18. It is fundamental that in construing the words of a statute "[t]he legislative intent is the great and controlling principle" (*People v. Ryan*, 274 N.Y. 149, 152, 8 N.E.2d 313; . . . Indeed, "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down" (*United States v. Whitridge*, 197 U.S. 135, 143, 25 S. Ct. 406, 408, 49 L. Ed. 696). . . . Finally, where a problem as to the meaning of a given term arises, a court's role is not to delve into the minds of legislators, but rather to effectuate the statute

(Cont'd)

In the action, Ms. Fuller reported the discriminatory statistics above and within days, not months or years, was given an evaluation which forever brought to an end any possibility of rising within the company and forever prohibited any possibility of receiving a positive recommendation if she sought new employment. Moreover, it is also uncontroverted, that in Ms. Fuller's previous five years at Instinet that all her reviews were excellent. Her review after reporting the § 1981(c) violation was scathing and derogatory. The fact that Instinet did not demote Ms. Fuller was in keeping with Instinet's policy of not displaying an immediate red flag under § 1981. It, thus, kept within what Instinet perceived as Second Circuit retaliation law. Instinet, and the Second Circuit law, however, are clearly at odds with the statute: 42 U.S.C. § 1981(c). Moreover, Instinet in the past had provided evaluations on a yearly basis and it is uncontroverted that it changed its policy of evaluation immediately after Ms. Fuller brought her Title VII and § 1981 actions.

Summary judgment was improper in the action because Ms. Fuller deserved all the protections of the "impairment" clause: § 1981(c).

Ms. Fuller respectfully asks the Court to *compare* (side-by-side) the previous review written six months prior, to her racial complaints and her attorney's letter to Doug Atkin, President of Instinet, dated July 27, 1999. Ms. Fuller has the right to a jury trial on the "cause and effect" of her attorneys writing a racial complaint to the President of Instinet and her extremely bad review barely days later. Compare Ms. Fuller's counsel's letter of July 27, 1999 and immediate finished Instinet review August 16, 1999 (directly below).

(Cont'd)
by carrying out the purpose of the statute as it is embodied in the words chosen by the Legislature (see, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-40).

SUMMARY

Bernadette is dedicated and hard-working employee. Her skill and knowledge have been increasing steadily and she is at the point where I feel that she should begin seeking higher-level work, such as some of the projects that the more senior member of the group work on. She has excellent qualitative analysis skills and I would like to see her utilize them more in the future, possibly by assist in compiling the U.S. Market packet with Alaric.

Reviewer and superior, Linda Giordano's Performance Review, dated *12/98*.

COMMENTS

a. "Requires a lot of supervision."

b. "Still cannot perform high level analysis without assistance."

c. "Has not demonstrated that she is capable or willing to move to a position of more responsibility."

d. "Frequent lateness and absence from her desk during the day has put an unfair burden on her co-workers." Instinet's Linda Giordano *Mid-year review, August 16, 1999*, listed her effort at Instinet in such a manner that no employer would ever hire her as an employee.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of the matter.

Respectfully submitted,

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